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IN THE SUPREME COURT OF THE STATE OF IDAHO

CANDACE "ANDI" W. ELLIOTT,)	
)	SUPREME COURT NO. 44068
Plaintiff/Appellant,)	
)	RESPONDENT'S REPLY TO
v.)	APPELLANT'S BRIEF
)	
KURT E. YOUNG, SR.,)	JEFFERSON COUNTY
)	Case No. CV-2015-04
Defendant/Respondent.)	
_____)	

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
Of the State of Idaho, for Jefferson County

Honorable Alan C. Stephens, District Judge, presiding

Candace (Andi) W. Elliott
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Hamer, Idaho 83425

PRO SE LITIGANT
PLAINTIFF-APPELLANT

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DEFENDANT-RESPONDENT

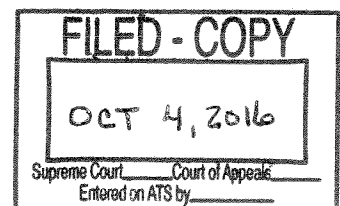


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STATEMENT OF THE CASE

Plaintiff Candace Elliott (hereafter Candace) filed the above case against Defendant Kurt E. Young, Sr. (hereafter Kurt), on January 7, 2015. Her claim is for malicious prosecution. This claim is based on another case, CR-2011-3409, in Jefferson County titled State of Idaho v. Candace W. Elliott. In that case Candace was charged on August 22, 2011, by a criminal complaint and a summons with trespassing, Idaho Code 18-7008(8). The complaint charged Candace with trespassing on the property of Kurt on July 24, 2011, in Hamer, Idaho. That case was tried before Judge Robert Crowley. It started on February 13, 2012, and was concluded on June 10, 2013, with five separate days of trial and several continuances. The trial resulted in an acquittal which was explained in a decision by Judge Robert Crowley dated July 2, 2013. In that decision the Court found beyond a reasonable doubt that Candace had been “trespassed” from Kurt’s property on April 20, 2011, and that beyond a reasonable doubt she was in the vicinity of Kurt’s property on July 24, 2011, and she did not have permission to enter upon his property. However, the Court found that there was not proof beyond a reasonable doubt that Candace had actually trespassed on the property of Kurt.

Following the acquittal Candace filed the above case against Kurt for malicious prosecution on January 6, 2015. Kurt’s Answer to the Complaint was filed on February 4, 2015, by attorney Robin Dunn. Royce B. Lee substituted as attorney for Kurt on May 29, 2015. Candace filed a Motion for Summary Judgment on September 8, 2015, R p. 78, and Kurt filed a Cross Motion for Summary Judgment on December 21, 2015. R p. 350. Oral arguments were presented to the Court on February 1, 2016. Judge Stephens issued his

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Decision and Order Re: Cross Motions for Summary Judgment on February 5, 2016, R p. 490, in which he granted Kurt's Motion for Summary Judgment dismissing Candace's Complaint and he denied Candace's Motion for Summary Judgment. Candace filed a Notice of Appeal from that Decision and Order on March 15, 2016.

STATEMENT OF FACTS

Kurt Young is the owner of a house, corrals, outbuildings, horses and farm acreage located in Hamer, Jefferson County, Idaho. On the west side of his property there is a county road which parallels the edge of his property running north and south. On April 20, 2011, Kurt saw someone drive to his property on the county road, get out of a car and walk to his fence and take pictures of his property. He thought the person was taking pictures of his horses and also his children who were outside of the house at the time. Kurt thought the person was Candace Elliott, who had been involved in making complaints in the community and other places to the sheriff's department about the abuse of animals. Kurt contacted the Jefferson County Sheriff's Office and asked that the Sheriff's Office give notice to Candace that she was "trespassed" from entering his property.

Later, on July 24, 2011, a car drove slowly past Kurt's house and then turned around and again drove slowly past his property while the passenger was looking at his property and horses. Kurt went to locate a camera in his house and then went outside where he saw a female walking on the road in front of his house. He also saw the car stopped in his driveway. He took pictures of the female, who turned out to be Candace Elliott, while she was taking pictures of neighbors' horses, and he took pictures of the car in different locations

depending on the time he took the photos. Kurt then called the Jefferson County Sheriff's Department to make a complaint against Candace Elliott for trespassing.

Shortly thereafter Sheriff Deputy Clements responded to Kurt's residence about the complaint. Deputy Clements interviewed Kurt and other family members. He also interviewed the neighbors, Dan and Brenda Murdock, who were the owners of the horses on the other side of the road. He obtained the pictures that Kurt Young had taken with his camera. Later he interviewed Candace Elliott and received pictures that she had taken of the neighbors' horses.

Fortunately the interview was all recorded on Deputy Clements' video cam. A transcript of that interview was never prepared or submitted to the Court although a DVD of the interview was made a part of the record. R p. 103. A typed transcript of portions of the video interview was prepared by Royce Lee and is part of the Clerk's Record. R p. 470 – 473.

The video cam recording indicated that Kurt explained to Deputy Clements where he saw the car traveling in front of his house, where it was parked in his driveway, where Candace would have gotten out of the car when he was getting the camera, and where the car was later parked farther down the road when she got back into the car. According to the video recording, Kurt pointed to the location for Deputy Clements to see where the car was located and Candace would have gotten in and out of the car.

Kurt signed a complaint form as well as his written statement, but that complaint was not used to charge Candace Elliott. Kurt had no further contact with the prosecuting attorney's office or Deputy Clements after July 24, 2011, before the actual complaint, which

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was prepared by the prosecuting attorney, was filed with the Court. On August 18, 2011, Deputy Clements filed a Probable Cause Affidavit with the Magistrate Court along with a Complaint and Summons prepared by the Jefferson County Prosecuting Attorney. Magistrate Judge Crowley reviewed the Probable Cause Affidavit and signed and filed the Complaint on August 22, 2011, which charged Candace Elliott with trespassing.

The criminal case against Candace Elliott was tried by Judge Crowley without a jury. The trial commenced on February 13, 2012, but there were several continuances so the trial was not finished until June 10, 2013. During the trial Kurt Young testified that he had not personally seen Candace located on his property but saw the vehicle in which she was riding located on his property after she got out of the car and again at another location where she got back in the car which he said was on his property. The trial resulted in an acquittal by Judge Crowley. His decision noted uncertainty about the exact location of Candace Elliott on Kurt's property and the uncertainty about the effect of the public right-of-way at the edge of the road for some distance which would have been in the gutter or borrow pit. Judge Crowley found there was not proof beyond a reasonable doubt on that issue and therefore granted an acquittal.

After that acquittal Candace Elliott filed a Complaint for Malicious Prosecution in Case No. CV-14-680, Candace Elliott v. Blair Olsen, et. al., against Jefferson County Sheriff Blair Olsen, Jefferson County Prosecutor Robin Dunn, Deputy Prosecutor Amelia Sheets, Jefferson County Sheriff Deputy Clements, and the Jefferson County Board of Commissioners. That case resulted in Judge Stephens granting a Motion for Summary Judgment in favor of all Defendants on January 13, 2016¹. That case is now on appeal. As

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noted in the Decision and Order Re: Cross Motions for Summary Judgment in this case, R p. 490, Judge Stephens referred to his decision in the Blair Olsen case as additional grounds for his finding of probable cause in Kurt's case.

Additionally, this Court has found that there was probable cause to charge the Defendant under the code section used. *Elliott v. Olsen, et.al., CV-14-680 (Jefferson County District Court 2015)*. In making that determination the Court relied on more evidence than the Defendant's [Kurt's] witness statement alone. The pictures of the Plaintiff [Candace], while not depicting her outside of the right-of-way, are evidence that she had the opportunity to commit the crime. Additionally, the Defendant's witness statement was not the only statement placing Candace on the property. It may be that none of the witnesses actually saw the Plaintiff's person outside of the public right-of-way, but they do claim to have seen her off of the road. Again, the complaining party is not expected to know the law when issuing a complaint. *Howard v. Felton, at 290* (an attorney with decades of experience is not required to know the law before filing a complaint). *Id.* at R p. 498.

Candace argues that Kurt really does not own the property to the middle of the road and so she could not have been trespassing. Kurt's Warranty Deed, which is attached as Exhibit A to the Affidavit in Opposition to Plaintiff's Motion for Summary Judgment, R p.150-151, indicates that he owns up to the western section line in section 20 of the southwest quarter of the southwest quarter, which line is the county road in question. Generally, a person who owns property abutting a public roadway actually owns the property to the middle of the road. Idaho Code § 55-309 also provides a presumption that ownership goes to the middle of the road:

Ownership of street by Abutter. An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.

At the trespass trial the Prosecutor and Candace's attorney stipulated that there was a

¹Candace also filed lawsuits against Dan Murdock, CV-14-2384, and against Brenda Murdock, CV-13-1059. These cases have also been dismissed by the Court, but the case against Dan Murdock is on appeal.

public right-of-way extending 30 feet from the middle of the road on each side.

ARGUMENT

Issue 1: Whether the District Court was correct in dismissing Candace Elliott's Complaint for Malicious Prosecution on a Motion for Summary Judgment.

As noted in Judge Stephens' Order and Decision:

The elements of a malicious prosecution claim are: "1) that there was a prosecution, 2) that it terminated in favor of plaintiff, 3) that the defendant was the prosecutor, 4) that the defendant was actuated by malice, 5) that there was want of probable cause, and 6) that damages were sustained." *Howard v. Felton*, 85 Idaho 286, 290, 379 P.2d 414, 416 (1963). In order for the Defendant to succeed in his summary judgment motion, he must show that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law as to any one of these elements. R p. 493.

Judge Stephens granted Kurt's Motion for Summary Judgment for Candace's failure to provide sufficient evidence on two elements which are required to prove her case. First on element number 3, the District Court found that Kurt was not the prosecutor of the case. The District Court noted that Kurt was a complaining witness but the Prosecuting Attorney independently made the decision and filed his own formal complaint charging Candace with criminal trespass. Second on element number 5, the District Court found that there was probable cause for the criminal complaint to be issued against Candace after full and fair disclosure by Kurt and other witnesses. R p. 493.

Although Candace identified 14 issues in her Appellant Brief at pages 14 and 15, the primary issue raised by her relates to whether there was probable cause with a full and fair disclosure for the issuance of a complaint for trespass against her. Candace states that Kurt said he had pictures of her trespassing and that he saw her trespassing on his property.

Candace then states that at the trial Kurt admitted he did not actually see her located on his property off the roadway and that he did not have any pictures of her actually trespassing.

Fortunately modern technology has provided assistance in reconstructing what Kurt actually said to the investigating Deputy Sheriff John Clements when Kurt was interviewed shortly after the incident occurred. The entire video cam recording is provided in the Clerk's record as an Exhibit. R p. 103. Although there is not a complete written transcription of that interview on the video camera of Deputy Clements, a partial transcription of relevant statements by Kurt and by Deputy Clements was prepared by Royce Lee and submitted as Exhibit A attached to the Affidavit of Royce Lee dated January 29, 2016. R p. 470 – 473. A careful review of those statements provides a clear understanding of what Kurt explained to Deputy Clements. The following information is obtained from the video cam transcription.

1. On July 24, 2011, shortly after 1:00 p.m., Kurt became aware that a white car had driven slowly past his house and then turned around and came back towards his house. He saw the passenger, later identified as Candace Elliott, "looking back into mine [Kurt's property] again but I didn't get the camera in time." R p. 472, log 1:27.
2. Kurt then went to get a camera, and did not have visual contact with Candace temporarily. R p. 472, log 1:27.
3. By the time Kurt returned with a camera and had visual contact with Candace, "she was walking across the street and checking out and taking pictures of all the other horses." Kurt said "I got a picture of her car right there" and pointed to the location of the parked car when he explained this to Deputy Clements. R p. 472, log 1:27. Note that Kurt's explanation indicates that he did not see her personally get out of the car

but that he saw her as a passenger in the car close by his property and then a short time later he saw her walking across the street and taking pictures of the neighbor's horses and he saw and explained to the Deputy where the car was parked on his property after she got out of the car.

4. Deputy Clements then left and interviewed the neighbors, Dan Murdock and Brenda Murdock, and then he returned to continue the interview with Kurt. At that time Kurt further explained to Deputy Clements that, "a white car was in that driveway right there", pointing to the location of "right there". R p. 472, log 18:50.
5. Kurt further explained that, "she [he]went from right there all the way down and parked right in front of my gate. Isn't that considered on my property?" R p. 472, log 20:02.
6. Deputy Clements responded by saying, "She has to be on the property. When she came into the yard to take pictures that's on your property." R p. 472, log 20:12.
7. Kurt further explained, "She was right back there [Kurt pointing] and she was right back over here [Kurt pointing] with her camera". R p. 472, log 20:20.
8. Deputy Clements then confirmed that he personally "trespassed" Candace from Kurt's property. R p. 472, log 20:49.
9. The next part of the interview is done inside Kurt's house while Kurt is showing his pictures to the deputy. Again he says, "I got out here [outside] just as she was pulling away from up there looking in my back yard (before he had a camera). And then I got her (with the camera) over there taking all these pictures here...I got her there." R p. 472, log 21:25. Note that Kurt does not claim that he took a picture earlier than when

she was “over there taking all these pictures”, which was after she was standing on the roadway taking pictures of the neighbor’s horses. He then explained about another picture, “This is when they were parked here by the front of my place.” Referring to another picture, “That’s when they was out and he pulled up and then back on the road and changed cameras.” Note that Kurt explained that he (Candace’s husband and driver) then pulled back on the road, indicating that he had been off the road and therefore on Kurt’s property before that moment. Pointing to another picture Kurt said, “That’s her walking down and then they [he] pulled up on my grass here [down road by gate] and she walked out and around and she got in the car and there you go.”

R p. 472, log starting at 21:25.

10. Deputy Clements then asked Kurt, “So she definitely was on your end of the property though?” R p. 472, log 28:41. Kurt answered by saying, “She was right here by the fence [Kurt pointing] and she was right there where they got that car parked [Kurt pointing].” R p. 472, log 28:46.

11. Kurt then explains his understanding of trespass by saying, “All they have got to do is step one freaking foot on it.” R p. 472, log 28:51. Deputy Clements then confirms that understanding by stating, “Yep.” R p. 473, log 28:55.

12. Deputy Clements also interviewed Klurissa Young, Kurt Young’s daughter, who was present during this time. A copy of her statement is not in the court record. Deputy Clements quotes Klurissa as saying “Klurissa said she saw a car with two people in it and a female got out of the car and was on their property taking pictures of the property and of the Murdock’s property as well.” R p. 109.

13. In addition Deputy Clements also interviewed Brenda Murdock and Dan Murdock, who were across the street from Kurt's residence. Brenda was outside cooking on her front step. See their written statements at R p. 456 and 457.

14. At the time Kurt stated that he wanted a charge filed against Candace, he had explained to Deputy Clements what he had personally seen about Candace being on his property. He had answered Deputy Clements' questions about what he had seen. He had pointed out to Deputy Clements the specific locations where he saw the car parked where Candace Elliott must have exited the car on his property and where she got back into the car on his property. He had explained to Deputy Clements that the car had pulled off the road and then had pulled back onto the road on one occasion, demonstrating that in fact the car was parked off of the public road, which would have been on Kurt's property. Deputy Clements had twice confirmed to Kurt that this information indicated that Candace had in fact trespassed on Kurt's property.

Kurt filed an Affidavit in Opposition to Plaintiff's Motion for Summary Judgment dated September 22, 2015. R p. 144. Candace argues that Kurt's Affidavit is inconsistent with his testimony at trial. In the Affidavit Kurt explained that the distance between the middle of the road and where he saw the car first parked on his property was about 31 to 31 ½ feet from the middle of the road. R p. 144. At trial Kurt had testified similarly that he thought the car had been parked about 35 feet from the middle of the road. See Judge Stephens' Order and Decision, R p, 492. The prosecutor and Candace's defense attorney had stipulated during the trespass trial that the right-of-way extended 30 feet from the middle of the road. R p. 492. Kurt's testimony in the Affidavit and at trial was more detailed than the

information give on the video cam, but since Deputy Clements saw the location where Kurt was pointing, he knew that same information when he filed his report and submitted it to the prosecutor.

Kurt does not state in the Affidavit that he saw Candace personally get out of the car when it first stopped. Rather, he states, “Candace Elliott got out of the passenger side and walked around the car onto the public road.” He had seen her riding in the car passenger side a few moments before and then next saw the car parked with the passenger side closest to his property and Candace walking on the public road. She was in the car and then had to exit where the car was parked on his property, in order to be walking across the public road when he personally saw her again. Kurt’s Affidavit is accurate and consistent with his other testimony.

In the Affidavit Kurt also again reaffirmed that “I believed that, and still believe, that she was on my property on July 24, 2011, as compared to being on the public roadway or right-of-way.” R p. 147. Kurt also stated that “I believe there was a reasonable basis for me and Deputy Clements to state that she had trespassed on my property.” R p. 147.

On the Motion for Summary Judgment the question whether there was probable cause to issue the complaint is a question of law for the Court to determine. *Herrold v. Idaho State School of the Deaf and Blind*, 112 Idaho 410, 732 P.2d 379 (Ct. App. 1987). Judge Stephens indicated in his Decision dated February 5, 2016, that he had personally reviewed the video cam interview by Deputy Clements with Kurt, as well as the written statement of Kurt, and compared that testimony with Kurt’s trial testimony. R p. 497. Judge Stephens had all of the information given by Kurt which was available to the prosecuting attorney who later decided

to file the criminal trespass complaint against Candace. Judge Stephens also noted that in another related case in which Candace was a Plaintiff, that he had already reached a conclusion and issued a decision finding that there was in fact probable cause for the issuance of the trespassing complaint against Candace. The Court is entitled to take judicial notice of the record in another legal proceeding at any time. See Idaho Rules of Evidence, Rule 201. Judge Stephens also had the benefit of the record in this case which included the Warranty Deed, testimony of Kurt that he owned the property in question to the middle of the road, the probable cause affidavit of Deputy Clements, and the Affidavit of Kurt clarifying that he did not know Robin Dunn before the trial actually commenced on the case. (See Issue No. 2 hereafter). This indicates that Judge Stephens had the benefit of the “full and fair” disclosure by Kurt and other witnesses on which the prosecuting attorney determined that a criminal complaint should be issued.

Deputy Clements may not have been aware of the legal issue about whether Candace would be guilty of trespass if she was on Kurt’s property, but on the public right-of-way. Likewise the prosecuting attorney may not have evaluated that issue before issuing the complaint. The prosecuting attorney continued to press prosecution of the case, through five days of trial and over sixteen months, even though that issue was raised during the trial. Therefore, the prosecuting attorney must have still concluded that there was probable cause to proceed with prosecution of the case in spite of the question about the public right-of-way.

If a complaining witness complains to law enforcement about an alleged crime by another party, and relies on the advice of a private attorney or a prosecuting attorney, the complaining witness still has a complete defense to a complaint for malicious prosecution,

even if the advice of the private attorney or prosecuting attorney is in error. *Thomas v. Hinton*, 76 Idaho 337, 281 P.2d 1050 (1955); *Donaldson v. Miller*, 58 Idaho 295, 72 P.2d 853 (1937); and *Lowe v. Skaggs Safeway Stores*, 49 Idaho 48, 286 P. 616 (1930). Even if Deputy Clements was not aware and did not raise that issue with the prosecuting attorney, and even if the prosecuting attorney was either not aware of that issue or was not correct in its interpretation that Candace would be guilty of trespass if she went on Kurt's property but within the public right-of-way, Kurt still has a complete defense to the claim for malicious prosecution. Kurt reasonably understood and in fact he was correct that he owned the property to the middle of the roadway. See I.C. §55-309. It was reasonable for Kurt to understand that if Candace went on his private property immediately adjacent to the paved highway then she was guilty of a trespass, as in fact he is the owner of that property adjoining the paved highway. Furthermore, the location where Kurt saw the car first parked was actually outside the 30 foot right-of-way. This issue became a question at trial and ultimately resulted in Judge Crowley determining that he could not find beyond a reasonable doubt that Candace Young had been on Kurt Young's property which was not within the public right-of-way.

The final result of this review of all the facts given to Deputy Clements and to the prosecuting attorney indicates that Kurt gave a "full and fair disclosure" of the incident with Candace. Therefore he is entitled to the benefit of a "complete defense" to a charge of malicious prosecution. *Thomas v. Hinton*, 76 Idaho 337, 281 P.2d 1050 (1955); *Robinson v. White*, 90 Idaho 548, 414 P.2d 666 (1966); *Rowles v. Country Kitchen*, 99 Idaho 259, 580 P.2d 863, (1978); and *Gowin v. Altmiller*, 663 F.2d 820 (9th Cir. 1981).

A comparison of Idaho case law confirms that the dismissal of Candace's complaint on the Motion for Summary Judgment was correct. The present case is similar to the case of *Gowin v. Altmiller*, 663 F.2d 820 (9th Cir. 1981). In that case the defendant in a malicious prosecution case had previously given a letter to the sheriff, complaining about the plaintiff's conduct. The prosecutor decided to file a criminal complaint for embezzlement. After a conviction the case was later reversed on appeal. The Court held that the complaining person (defendant in malicious prosecution case) was shielded from liability because the criminal charge was based on the independent decision of the prosecuting attorney. The Court stated,

“The Idaho Supreme Court has ruled that the advice of counsel is a complete defense to an action for malicious prosecution when the prosecution is instituted in reliance on such advice, given after full disclosure of the facts to the attorney. *Allen v. Moyle*, 84 Idaho 18, 24, 367 P.2d 579, 583 (1961.)” Id, at 823.

Since the Jefferson County Prosecutor made the independent decision to file the trespass complaint against Candace, and Kurt gave a full and fair disclosure, her claim for malicious prosecution against Kurt must fail on element number 3. In the present case Kurt was not the prosecutor, since the Jefferson County Prosecutor Robin Dunn decided to initiate the case by preparing and filing a formal Complaint and Summons.

Another similar case is *Donaldson v. Miller*, 58 Idaho 295, 72 P.2d 853 (1937). In that case the Plaintiff in a malicious prosecution case had been previously charged with criminal trespass for cutting wood on the Defendant's property. The Plaintiff thought he had an easement on the land of the Defendant from a prior condemnation proceeding and therefore had the right to go on Defendant's property. The prosecuting attorney investigated the case and reached the opinion that the Plaintiff did not have a right to go on the land so in

fact there had been a criminal trespass. The prosecutor continued to prosecute the case for five and a half months after it was filed and even filed an amended complaint during the case. The case went to trial and resulted in a hung jury. At the end of the case on the Plaintiff's complaint for malicious prosecution, the judge granted a Motion for Non-Suit against the Plaintiff. The Plaintiff appealed and the Idaho Supreme Court held that the complaining witness, the Defendant in the malicious prosecution case, had a complete defense because he had relied on the advice of an attorney, even if the attorney was in error on that advice. Likewise in the present case, Kurt Young reasonably believed that Candace had trespassed on his private property. After investigation by law enforcement and review by the prosecuting attorney, the prosecuting attorney also believed there was probable cause to issue the complaint, and in fact issued the complaint directly from the prosecuting attorney's office. Even if the prosecuting attorney's decision was in error, potentially due to a mistake about the effect of the public right-of-way, Kurt Young should still have the benefit of a "complete defense" in this case.

A similar finding was made in the case of *Robinson v. White*, 90 Idaho 548, 414 P.2d 666 (1966). In that case the Defendant in the malicious prosecution case had reviewed a potential criminal charge against the Plaintiff with his own private attorney and with the prosecuting attorney. Both attorneys advised him that there was in fact a proper claim that the Plaintiff had committed a felony of grand theft when he took a television outside of the jurisdiction and did not pay the outstanding loan to the lender. The Supreme Court held that the advice of the prosecuting attorney was an absolute bar to a complaint against the complaining witness for malicious prosecution.

In another case, *Thomas v. Hinton*, 76 Idaho 337, 281 P.2d 1050 (1955), the Plaintiff in a malicious prosecution case had previously been charged with grand theft for removing hay from the complaining witness' property. The case was dismissed at preliminary hearing. The Idaho Supreme Court held that the complaining witness had given full disclosure of his knowledge about the event and the prosecuting attorney had made the independent decision to proceed with prosecution on the criminal case. The court held that this was a complete defense for the complaining witness even if the prosecuting attorney had been wrong in his decision.

In the case of *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 126 (1986), the attorney for the Plaintiff in a dental malpractice case was sued for malicious prosecution by the defendant dentist. Before filing the case the Defendant attorney in the malicious prosecution case had obtained opinions from other dentists that malpractice had occurred and prior to trial he had an expert witness who also gave the opinion that there had been malpractice. However, shortly before trial his expert witness changed his opinion. As a result the malpractice attorney had to dismiss the case. The Idaho Supreme Court held that the facts were not disputed about what the malpractice attorney had known and investigated at the beginning of the case, and even if some facts became disputed later, that did not override the finding that there had been probable cause at the beginning of the case. The Court noted that the time to decide whether there was probable cause to proceed with the case was at the time the decision was made to prosecute the case. See also *Shanahan v. Gigray*, 131 Idaho 664, 962 P.2d 1048 (1998). Similarly in the present case there was probable cause when the complaint was issued, even though a dispute arose later during the trial which resulted in an acquittal.

In the case of *Herrold v. Idaho State School of the Deaf and Blind*, 112 Idaho 410, 732 P.2d 379 (Ct. App. 1987), the Plaintiff in the malicious prosecution case had been previously charged with grand theft for misuse of long distance telephone services as an employee of the Defendant School for the Deaf and Blind. Later, after the complaint had been filed, a dispute arose about certain facts relating to the alleged misuse of the long distance services and the criminal charge was dismissed. The Idaho Supreme Court held that as long as there was probable cause at the beginning of the case, even if disputed facts arose later, there was still a complete defense for the complaining party who was later sued for malicious prosecution. The Court further noted that whether there was probable cause at the commencement of the case is to be decided as a matter of law by the Court in the malicious prosecution case. The Court further noted that the finding of probable cause by the original magistrate judge would preclude a later finding of no probable cause if there had been full disclosure.

In the case of *Lowe v. Skaggs Safeway Stores*, 49 Idaho 48, 286 P. 616 (1930), an employee had been charged with embezzlement related to the writing of a check. The investigating officer and the magistrate judge issuing the original complaint made an incorrect assessment of the forgery and the case was dismissed. When the employer and the employer's staff were later charged with malicious prosecution, the Idaho Supreme Court held that the complaining witnesses were not liable for malicious prosecution if the magistrate judge or the law enforcement officer had made a mistake, so long as there was full and fair disclosure. The Court also noted that if there was probable cause based on

information provided by the complaining witness, then there was also an inference that there was no malice by the complaining witness.

These foregoing cases are all similar to the present case. A complaining witness reported a potential criminal act or a civil cause of action. The facts were reviewed by a prosecuting attorney or private attorney who determined that probable cause existed and the case should be filed. At or before trial factual disputes arose which resulted in a dismissal or acquittal. In each case the appellate court held that the complaining witness was not liable for malicious prosecution because the prosecuting attorney or private attorney had decided there was probable cause to file the complaint and there was proper disclosure of information from the complaining party. These same factors also occurred in the present case, so the Order dismissing Candace's Complaint should be upheld.

A good comparison of the present case with a case in which the Court found there was lack of probable cause is the case of *Ross v. Kerr*, 30 Idaho 492, 167 P. 654 (1917). In that case the employer complaining witness had initiated a felony complaint for embezzlement against an "employee" regarding funds collected by the employee. However, the employer misstated the relationship between the employer and employee because in fact it was determined to be a creditor/debtor relationship. As a result there could not have been any criminal conduct between the "creditor" complaining witness and the debtor, the Plaintiff in the malicious prosecution case. In fact it was determined that the employer had lied in his explanation about probable cause and that the employer was motivated by actual malice and that he was trying to harm the person charged with embezzlement because that person was then competing with the business of the employer. This kind of improper motive and ill will,

together with the misrepresentation by the complaining witness, was upheld by the Supreme Court to present a valid claim.

The case of *Allen v. Moyle*, 84 Idaho 18, 367 P.2d 579 (1961) also provides a good comparison to show when a summary judgment is not appropriate to dismiss a malicious prosecution claim. In *Allen* the Plaintiff in the malicious prosecution case had been previously charged with grand theft for taking a tractor belonging to the complaining witness, the Defendant in the malicious prosecution case. The Plaintiff Allen claimed that he had explained to an agent of the Defendant Moyle that he was taking the tractor to do some road work as Defendant Moyle had previously instructed him to do, in connection with some kind of employment relationship or prior permission from Defendant Moyle. Plaintiff Allen claimed the agent told him that he would tell that information to Defendant Moyle. Defendant Moyle claimed that he had only been told by his agent that Plaintiff Allen had taken the tractor, but that he had not been told that he was just taking the tractor to perform some work on a road as instructed by the Defendant Moyle. The Idaho Supreme Court held that this dispute and uncertainty about the knowledge of the complaining witness created a substantial factual issue which had to be determined by the trier of fact and not by a dismissal on a Motion for Summary Judgment. The Supreme Court further noted that the complaining witness, Defendant Moyle, had allegedly admitted that he had filed the criminal complaint for an inappropriate reason, to get the Plaintiff Allen to stop using his equipment. This case indicates that when there is a significant disputed fact about probable cause, then summary judgment would not be appropriate.

Fortunately in the present case there are no disputed facts because Deputy Clements' video cam recorded the entire interview between Kurt Young and the Deputy as well as with other witnesses. As a result the facts were not in dispute and were reviewed by Judge Stephens as he reached the conclusion that there was probable cause for issuance of the complaint by the prosecuting attorney against Candace.

Issue 2: Whether Kurt Young and Prosecutor Robin Dunn were acquaintances or friends when the complaint was filed against Candace Elliott, causing the Prosecuting Attorney to not be independent or unbiased.

In Appellant's Brief, Candace argues that the prosecuting attorney, Robin Dunn, was not independent or unbiased because allegedly he was a close personal friend of Kurt. See Appellant's Brief, page 25. Candace references a statement by Robin Dunn that he and Kurt were "long time friends." That statement is not part of the record on this appeal. It is not known exactly when that statement was made, but if it was, it was probably in a hearing on Candace's Motion to Disqualify Robin Dunn as Kurt's private attorney in this pending case. That hearing was held on March 16, 2015. By that time the trespass case against Candace Elliott had proceeded for almost four years. Perhaps Mr. Dunn felt that was a "long time". However, Kurt clarified in his Affidavit dated January 28, 2016, that he did not know Robin Dunn before the filing of the complaint against Candace and in fact he never met Robin Dunn until the trial. R p. 467. Candace did not refute that information. Candace also alleges that the relationship between her and Robin Dunn was strained. However, that relationship is irrelevant on the issue of whether Kurt gave a full and fair disclosure of information in his report to Deputy Clements. As noted above, if an error was made by a private attorney or

prosecuting attorney, that does not change the complete defense that a complaining witness has against a complaint for malicious prosecution.

Issue 3: Whether Judge Stephens erred when he denied Candace's Motion to recuse himself in the present case.

Candace filed a Motion to Recuse Judge Alan Stephens on September 25, 2015. She cited constitutional grounds and that Judge Stephens had ruled against her in another related case, CV-14-0238, relating to Steve Murdock. Judge Stephens denied the Motion and noted that he did not know either the Plaintiff or the Defendant in this case and had no reason to have a bias or prejudice against either party. The Court properly noted this was a matter of discretion for the Court and that he found no reason for a recusal. R p. 224.

Just because Judge Stephens ruled against Candace in another case does not mean he is prejudiced against her and this is not grounds to recuse a Judge. *State v. Doe, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999)*.

Issue 4: Whether Candace Elliott should be ordered to pay Kurt Young's attorney fees and costs on appeal.

Kurt requests that Candace be ordered to pay his attorney fees and costs² for defending this appeal pursuant to I.A.R. Rule 40 and 41. Candace's original complaint asked for damages of \$24,674.17, R p. 9, so Kurt qualifies for an award of costs and attorney fees under I.C. § 12-120(1).

Kurt also qualifies for attorney fees under I.C. § 12-121 because Candace's Appeal was pursued frivolously, unreasonably and without foundation. Candace has asked this Court

²To avoid violating the bankruptcy stay, Kurt only requests fees and costs incurred after Candace filed bankruptcy on April 7, 2016. (Case No. 16-40279 J.D.P.)

to second guess the evidence and witnesses and to change findings and decisions clearly within the trial judge's discretion. Therefore, Kurt should be awarded his costs and attorney fees as the prevailing party. *Minich v. Gem State Developers*, 99 Idaho 911, 591 P.2d 1078 (1979); and *Evans v. Park*, 112 Idaho 400, 732 P.2d 369 (Ct. App. 1987).

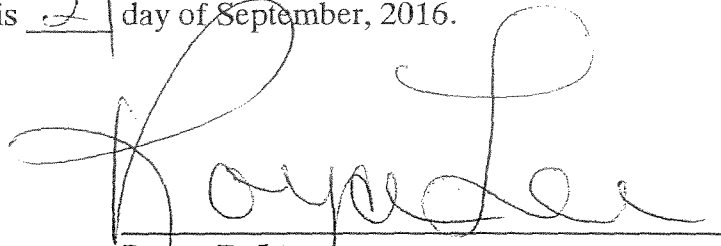
CONCLUSION

The Order dismissing Candace's Complaint for Malicious Prosecution against Kurt should be upheld. Judge Stephens correctly found that Candace had failed to provide sufficient facts to support her claim on two necessary elements, that Kurt was the prosecutor on her criminal case, and that there was a lack of probable cause when the Prosecutor filed the criminal complaint. Candace bases her claim on the short summary in Deputy Clements' report, rather than on the recorded interview and the actual statements by Kurt and other witnesses in that investigation. She also misunderstands the meaning of words in Kurt's Warranty Deed which say that Kurt's property is "subject to ... rights-of-way." She has interpreted that to mean Kurt does not own any land within 30 feet of the middle of the road.

Kurt gave a full, fair and accurate description of the events that occurred on July 24, 2011. A citizen should be able to explain a problem to law enforcement and then rely on law enforcement and the prosecuting attorney to make proper legal decisions about whether a criminal complaint should be filed. In order for the judicial system and law enforcement to function properly, citizens who are willing to report illegal conduct must be protected from liability for malicious prosecution.

Candace's appeal should be denied. The Court should award attorney fees and costs to Kurt.

Respectfully submitted this 29 day of September, 2016.



Royce B. Lee

CERTIFICATE OF SERVICE

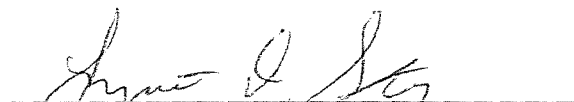
I HEREBY CERTIFY that on this 29th day of September, 2016, a true and correct copy of the foregoing Respondent's Reply to Appellant's Brief was served upon the following party as indicated:

Candace Elliott
2498 E. 2100 N.
Hamer, ID 83425

☐ HAND DELIVERY

☒ U. S. MAIL

☒ EMAIL Andi Elliott [straighttalkidaho@yahoo.com]



Lynette D. Stumpp